

DATIN HJH. ZALEHA MUJAMAL & ORS.

a

v.

PERKASA TRADING SDN. BHD. & ANOR.

FEDERAL COURT, KOTA KINABALU

SALLEH ABAS LP

LEE HUN HOE CJ (BORNEO)

GEORGE SEAH FJ

[CIVIL APPEAL NO. 76 OF 1983]

7 AUGUST 1984

b

CIVIL PROCEDURE: *Filing notice of appeal - When one-month limitation period for filing notice starts to run.*

c

At the High Court of Borneo, the appellants' application to set aside an earlier Court order failed. Solicitors for the appellants applied for further argument and the Judge certified that he required no further argument on 21 January 1983. The appellants' solicitors were informed of this by a letter dated 7 February 1983 from the Assistant Registrar. The Notice of Appeal was filed on 4 March 1983. The issue was whether that Notice of Appeal was out of time.

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Held:

That time runs from the date of the Assistant Registrar's letter, i.e., 7 February 1983.

[Notice of Motion struck out.]

Cases referred to:

Bank of America v. Chai Yen [1980] 1 MLJ 198

Tractors Malaysia Bhd. v. Southern Estates Sdn. Bhd. & Anor. [1984] 1 CLJ (Rep) 398

e

Legislation referred to:

Courts of Judicature Act 1964, s. 68(2) (as amended)

Federal Court (Civil Appeals) (Transitional) Rules 1963, r. 13(a)

Rules of the Federal Court 1980, r. 56 (a)

Rules of the Supreme Court, 1957 O. 54 r. 22A

Rules of the High Court 1980, O. 56 r. 2(2)

f

For the appellants/applicants - Razak Rouse; M/s. Rayner & Co.

For the 1st respondent - Robertson; M/s. Skinner Lind Robertson Pang & Willie

For the 2nd respondent - Mohtar, SFC

JUDGMENT

George Seah FJ:

g

This is an application under r. 56 of the Rules of the Federal Court 1980 for leave to appeal and it is supported by an affidavit affirmed by Abdul Razak Rouse, solicitor for the applicants/appellants dated 31 October 1983. The relevant facts may be shortly stated.

By Originating Summons No. K 129 of 1981 the appellants prayed that the Court Order of 6 July 1981 in Originating Summons No. K 45 of 1981 be set aside on the grounds that the first respondent herein failed to serve notice of the proceedings on the appellants as the parties affected which resulted in the non-disclosure of the full facts of the matter. The application was dismissed with costs on 17 January 1983. On 18 January 1983 solicitor for the appellants applied for further argument in Open Court under s. 68(2) of the Courts of Judicature Act 1964 (as amended). The learned Judge certified that he required no further argument on 21 January 1983 and the appellants' solicitor was duly informed of this by the Assistant Registrar by letter on 7 February 1983. Notice of appeal was filed on 4 March 1983.

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i

a Counsel for the first and second respondents had submitted that the notice of appeal was delivered out of time and that the period of one month should start to run from the issue of the Judge's Certificate, viz. 21 January 1983. For the appellants it was argued that since the date of the Judge's Certificate differed from the date of the Assistant Registrar's letter informing the solicitor for the appellants that no further argument was required by the learned Judge, the one month's period should be computed from the date of the letter.

b We prefer the submission of Counsel for the appellants which seems to be supported by a decision of the Privy Council in the case of *Bank of America v. Chai Yen* [1980] 1 MLJ 198. In that case, the Privy Council had to consider r. 13(a) of the Federal Court (Civil Appeals) (Transitional) Rules 1963 [see the former r. 56(a) of the Rules of the Federal Court 1980] and O. 54 r. 22A of the Rules of the Supreme Court (now O. 56 r. 2 (2) of the Rules of the High Court 1980) and in giving the judgment of the Privy Council Lord Lane (now Lord Chief Justice of England) said at p. 200:

c ... in the case of an order made in chambers in which an application under O. 54 r. 22A has been lodged within the time allowed, the time for appealing under r. 13(a) runs from the date when the judge's decision not to require further argument is communicated to the applicant and not from the date of his original order.

d In our judgment, such a construction would appear to be in accord with the last limb of r. 56(a) of the Rules of the Federal Court 1980. The fallacy of the respondents' argument can be tested in this way: what happens if the Assistant Registrar sends the Judge's Certificate on 20 February? Does that mean that the one month should be construed as from 21 January leaving to the appellant only one day to file the notice of appeal? To take another extreme case. What happens if the Assistant Registrar were to despatch the Judge's Certificate after the one month's period, say on 25 February? Obviously, if we were to accept the contention of the respondents, any appeal filed by the appellant would be out of time, and application would have to be made to the full Federal Court for leave to appeal.

Now, the amended r. 56 reads:

f 56. No appeal shall, except by leave of the full Court, be brought after the expiration of one month -

(a) in the case of an appeal from an order in chambers, from the date when such order was pronounced **at the hearing or after the hearing in open Court or after the issue of the certificate by the judge that he requires no further argument, whichever is the later** or when the appellant first had notice thereof:
[The amended parts are emphasized]

g (b) ...
(c) ...

h Although r. 56 (a) was amended on 1 August 1980 by P.U. (A) 222/80 (see *Tractors Malaysia Bhd. v. Southern Estates Sdn. Bhd. & Anor.* [1984] 1 CLJ (Rep) 398), in our opinion, the result would still be the same. Applying this to the facts of this case, we would rule that the one month would begin to run from the date of the Assistant Registrar's letter, viz. 7 February 1983. Since the notice of appeal was filed on 4 March 1983 we hold that it was delivered within the time limit and that the application for leave to appeal was in fact not necessary.

We therefore strike out the Notice of Motion and order that each party to pay its own costs.

i Also found at [1985] 1 CLJ 36